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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 142

MICHAEL KENNETH HARRIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. _____

MICHAEL KENNETH HARRIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner of a violation of the Universal Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1970. See Appendix B to this petition.[1]

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to May 26, 1970.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The constitutional questions raised by petitioner involve both the First and the Fifth Amendments.

First Amendment: Is conscientious objection something under a young man's control and therefore an exception contemplated by the administrative agency regulation, 32 C.F.R. § 1625.2, that makes the issuance of an Order to Report for Induction the deadline for new information excepting only that of a status arising beyond his control?

Fifth Amendment: Two problems arise here: (1) May a conclusion be reached by a fact finding without the presence of any factual basis? (2) May an adminis-

1. This petitioner's Petition for Rehearing was denied by the Court of Appeals on March 27, 1970. See Appendix C to this petition.

trative agency's regulation contravene the intent of Congress?

The questions were raised in the trial court by a written motion for judgment of acquittal and briefed in the Court of Appeals.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment, the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.) and 32 C.F.R. § 1625.2. They are set forth in Appendix D.

5. STATEMENT OF THE CASE

The indictment charged Brossard with a violation of the Universal Military Training and Service Act for refusing to submit to induction.

Harris pleaded "not guilty" and was tried by the Honorable Manuel S. Real, District Judge, sitting alone without a jury. He was found guilty and given a three year sentence.

6. THE FACTS

Appellant registered with Local Board No. 125, Long Beach, California and was given number 4-125-47-2394.

He was classified in class I-A, meaning available for military service, and then was sent an order on October 25, 1967, to report for induction November 14, 1967.

Thereafter, on November 13, 1967, he asked for Special Form for Conscientious Objector and filed the same day [Ex. 62-65]. He requested a meeting with the Board and that his induction be postponed [Ex. 61].

He was never given an Appearance Before Local Board nor were his claims sent to the Appeal Board.

The Board informed him that he was to report for induction.

When ordered to report for induction on January 23, 1968, he reported but refused to submit to induction.

7. REASONS FOR GRANTING A WRIT

The Fifth Amendment question presented is of an importance greater than one individual's fate. The question is national because the reach of the Selective Service System is into every hamlet, the "calls" for induction show every indication of continuing, and the percentage of registrants professing conscientious objections to war is not decreasing, therefore, numerically many persons are affected.

The administrative agency's handling of these claims, and their often too summary disposition by the courts is due to insufficient guide lines, one conforming to the demands of the Fifth Amendment.

8. ARGUMENT

Petitioner was ordered to report for induction on November 14, 1967. On November 13, 1967, he asked for the Special Form for Conscientious Objectors and filed it the same day. He requested a meeting with the Board and that his induction be postponed. In his SSS Form 150, petitioner presented a prima facie case for the conscientious objector classification.

Selective Service System Local Board Memorandum No. 41, "Claims of Conscientious Objection," is a directive from the national office of the Selective Service System to

its over 4,000 local boards indicating the policy, among other things, that when a registrant claims conscientious objection status and his local board determines not to grant it, the board should invite the registrant to meet with it. Thus, the local board should invite the registrant to meet with it before denying his conscientious objector claim.

It has been held that the local board must invite such a registrant for an interview, since to grant it in some cases and not others violates equal standing. *United States* v. *Stout,* 415 F.2d 1190, 4th Cir. (1969).

This was not done in petitioner's case and thus he was denied important Fifth Amendment rights of equal protection of the law and due process of law.

Further, he was denied equal protection and due process of law because he was a "late claimant" in regard to conscientious objection. The Selective Service Regulation discriminates against "late claimants." Yet the intention of Congress is clear. Conscientious objectors are to be exempt if they meet the standard established by Congress. The Selective Service System regulations in this regard are in conflict with the will of Congress as enacted into law and thus are invalid.

The Selective Service System made an ipse dixit conclusion in denying the claim of petitioner in regard to his claim for a I-O conscientious objection classification. Such action violated petitioner's Fifth Amendment rights.

In *Dickinson* v. *United States,* 74 S.Ct. 152 (1953) at 157, the Supreme Court partially catalogued the many means by which local boards could test the truthfulness of a registrant's claims, and page 158, where it denounced "dismissal of the claim solely on the basis of suspicion

and speculation." As Mr. Justice Jackson stated the holding of the *Dickinson* Court bluntly (in his dissent):

> "Under today's decision, it is not sufficient that the board disbelieve the registrant. The Board must find and record affirmative evidence that he has misrepresented his case...." (74 S.Ct. 152, 159).
> This was not done in petitioner's case.

As the U. S. Court of Appeals for the Fifth Circuit stated the matter in a case concerning a I-O conscientious objector claim, *Williams* v. *United States,* 216 F.2d 350 (1954) at 352:

> "If there was no evidence before the board to refute the defendant's professed belief and if that belief was sincere on his part, then under the Act of Congress, he was exempt from training and service. As stated, we have found no such evidence in the record."

Despite petitioner's prima facie claim, his classification was not reopened. By holding that it did not reopen petitioner's classification, the local board deprived petitioner of important appellate rights. As Chief Judge Fred J. Nichol pointed out in *United States of America* v. *Clayton Arnold Melrose,* CR 68-124S, United States District Court, Southern District, South Dakota, on December 4, 1969:

> "The minutes of the interview on June 18, 1968, at which time the defendant appeared before the local board, state that 'The Board considered all the evidence in the file and did not reopen the classification.' By holding that it did not reopen the defendant's classification, the board precluded him from appealing its decision as the determination not to reopen is not appealable. Robertson v. United States, 404 F.2d 1141 (5th Cir. 1968). However, a reopening and consequent determination of the claim on its

merits gives the defendant the right to appear before the board thereafter and to appeal the decision to the administrative appeal boards. Davis v. United States, *supra*. It is apparent, therefore, that the determination not to reopen is in itself a separate and distinct decision of 'independent procedural significance' even though the board may, after reopening, give the registrant the same classification as previously held. Robertson v. United States, *supra*. The board cannot actually determine the claim on its merits, decide not to reclassify the registrant, and then label its action a determination not to reopen, thereby denying the registrant precious appearance and appeal rights. Miller v. United States, 388 F.2d 973 (9th Cir. 1967).

In the present instance, the Court finds that when the local board proceeded on June 18, 1968, to review 'all the evidence in the file' including that submitted following its original classification, it had reached a determination on the merits through a de facto reopening of the defendant's classification. The action of the board in labeling its determination a decision not to reopen was a denial of the defendant's procedural rights. Consequently, the order requiring him to report for induction is invalid and his refusal to comply with such order renders him guilty of no crime."

Further, the local board gave no rational reason for denying the claim of petitioner. It has been held that when a local board denies a conscientious objector classification in a situation where a prima facie case has been presented there must be a rational basis for such action and the local board must state its reasons for such action. *United States* v. *Haughton,* 413 F.2d 736, 9th Cir. (1969). This was not done in the case of petitioner.

The Court of Appeals merely concluded ipse dixit, that Harris was insincere, and like the trial court and the Selective Service System, gave no supporting facts.

Petitioner Harris believes that facts are required to support any conclusion. A naked conclusion is not enough; that the Fifth Amendment requires a factual basis.

Many courts are so expressing themselves. A hearing should be granted, on certiorari, to have this point thoroughly argued.

Here are samplings of the many decisions on this subject:

Annett v. *United States,* 10 Cir., 1953, 205 F.2d 689:

> "To merely state that he does not consider him sincere without giving a single fact upon which such belief is predicated does not rise to the dignity of evidence." [691]

Batterton v. *United States,* 8 Cir., 1958, 260 F.2d 233:

> "The Selective Service boards and the Department of Justice, rather obviously, were not convinced that the defendant here was what he claimed to be, and therefore denied his claim. It seems quite evident that there must be some affirmative evidence to support the rejection of the claimed exemption, or something in the record which substantially blurs the picture painted by the registrant and casts doubt on his sincerity or the genuineness of his claim. See Witmer v. United States, 348 U.S. 375, 382-384, 75 S.Ct. 392, 99 L.Ed. 428." [237].

Kessler v. *United States,* 5 Cir., 1969, 406 F.2d 151:

> "[4] To be precise about it, the disbelief of Selective Service officials will not justify the rejection of a claim for conscientious objector status unless there is some affirmative evidence to support the rejection of the claimed exemption or there is something in the record which *substantially* (emphasis added) blurs the picture painted by the registrant and thus casts doubt on his sincerity, Batterton v. United States, 8 Cir., 1958, 260 F.2d 233." [156]

United States v. *James,* No. 12,919 (C.A. 4, June 26, 1969), 2 SSLR 3231:

> "We are constrained to add that it is *not* sufficient that the board merely state its disbelief in a registrant's sincerity, for 'to sustain the denial of a claim on a mere *ipse dixit* of lack of sincerity from the Local Board or the hearing officer would create serious possibilities of abuse.' *United States* v. *Corliss, supra,* at 814. In short, there must be a 'rational basis' for the refusal of the Board to accept the validity of a registrant's religious claims. *Robertson* v. *United States,* 208 F.2d 166, 169 (10 Cir. 1953) [3232]."

CONCLUSION

For the above given reasons certiorari should be granted and the judgment should be reversed.

Respectfully,

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APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

MICHAEL KENNETH HARRIS,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

No. 23599

Order

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and PLUMMER,* District Judge.

(Filed March 5, 1970)

Appellant's conviction of refusal to submit to induction in violation of 50 U.S.C. § 462 is affirmed on the basis of this court's controlling decision in *Ehlert* v. *United States,* (9th Cir. 1970) ..... F.2d .....**

*The Honorable Raymond E. Plummer, United States District Judge for the District of Alaska, sitting by designation.

**Slip Opinion, Feb. 2, 1970.

APPENDIX B

United States Court of Appeals

FOR THE NINTH CIRCUIT

MICHAEL KENNETH HARRIS,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

No. 23599

Judgment

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 5, 1970.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, April 3, 1970
Before: BROWNING, HUFSTEDLER, and WRIGHT, Circuit Judges

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed March 2, 1970 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX D

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Congress declared in Section 1 of the Act: "Policy and intent of Congress:

> "(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 1625.2 of the Selective Regulations (32 C.F.R. § 1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

> *"When registrant's classification may be reopened and considered anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided,* in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1511

JOSEPH ROBERT STEVEN BROSSARD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1512

MICHAEL KENNETH HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1521

BRIAN RANDOLPH FLESCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Each of the cases in which review is sought by the above petitions for certiorari was decided by the court below on the basis of its *en banc* decision in

Ehlert v. *United States*, No. 1383, this Term, in which certiorari was granted on May 4, 1970. Each raises the identical issue presented in *Ehlert*—*i.e.*, whether the alleged maturation of conscientious objector beliefs is, within the language of 32 C.F.R. 1625.2, a circumstance "over which the registrant had no control," so that the local board is required to reopen the registrant's classification when such beliefs are alleged to have crystallized *after* a notice to report for induction has been sent. As the government has acknowledged,[1] the courts of appeals are sharply divided on this question. Resolution by this Court is thus necessary, and the Court has apparently determined that the *Ehlert* case is an appropriate vehicle in which to do so.

In view of these considerations, and since the court below expressly relied on its earlier decision in *Ehlert* in affirming the convictions involved in these cases, we suggest that action on the instant petitions should be deferred until after the Court has rendered a decision on the merits in *Ehlert*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

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[1] See our petition for a writ of certiorari in *United States* v. *Holmes*, No. 1311, this Term.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 384922 707